INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specification of error to be urged	6
Reasons for granting the writ	6
Conclusion	11
Appendix	12

CITATIONS

Cases:

The Cherokee Tobacco, 11 Wall. 616 — 10

Landman (*Estate of Jeanetta Burgess*) v. *Commissioner*, 123 F. 2d 787, certiorari denied, 315 U. S. 810 — 7, 8, 9

Landman (*Estate of Jacob Pierce*) v. *United States*, 103 C. Cls. 199 — 8, 9

Oklahoma Tax Commission v. *United States*, 319 U. S. 598 — 7, 8, 9

Superintendent v. *Commissioner*, 295 U. S. 418 — 10

Statutes:

Act of April 26, 1906, c. 1876, 34 Stat. 137, Sec. 19 — 4, 5, 10, 14

Act of May 27, 1908, 35 Stat. 312 — 4, 5

Sec. 1 — 16

Sec. 4 — 10, 16

Sec. 9 — 16

Act of May 10, 1928, c. 517, 45 Stat. 495 — 4, 5, 10

Sec. 3 — 4, 17

Sec. 4 — 4, 5, 10, 17

Internal Revenue Code:

Sec. 810 — 12

Sec. 811 — 12

Original Creek Agreement, Act of March 1, 1901, c. 676, 31 Stat. 861 — 3, 10

Sec. 3 — 12

Sec. 7 — 13

Supplemental Creek Agreement, Act of June 30, 1902, c. 1323 32 Stat. 500, Sec. 16 — 3, 10, 14

Miscellaneous:

S. Rep. No. 982, 70th Cong., 1st Sess. pp. 4–5 — 11

759512—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 325

THE UNITED STATES, PETITIONER

v.

A. M. LANDMAN, SUPERINTENDENT OF THE FIVE CIVILIZED TRIBES, FOR ESTATE OF PUNSKEE FIELD, DECEASED CREEK, ROLL NO. 4564

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause on June 6, 1947.

OPINION BELOW

The opinion of the Court of Claims (R. 11–17) is reported at 71 F. Supp. 640.

JURISDICTION

The judgment of the Court of Claims was entered on June 6, 1947 (R. 18). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the value of the 160 acres of restricted allotted land, including the oil and gas royalty interest therein, of a restricted Creek Indian, designated pursuant to Section 4 of the Act of May 10, 1928, to remain exempt from taxation, and owned by him at the time of his death, should be included in his gross estate for federal estate tax purposes.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra,* pp. 12–18.

STATEMENT

The special findings of fact of the Court of Claims (R. 4–11) may be summarized as follows:

Respondent, representing the Secretary of the Interior, who is by law custodian of the property of restricted Indians, duly filed a federal estate tax return for the Estate of Punskee Field, a full-blood, restricted Creek Indian, who died intestate on June 5, 1940. Decedent's entire estate passed in equal shares to his wife and two daughters, all full-blood, restricted Creek Indians. (R. 5, 9–10.)

Decedent's gross estate included $1,424, representing the value of his 160 acres of designated allotted land, plus $4,500, representing the value of his oil and gas royalty interest therein; $2,500 representing the value of a purchased house and

lot; $104,937.50 representing the value of United States Treasury bonds purchased for him by the Secretary of the Interior from restricted funds, plus accrued interest thereon of $638.89; cash of $7,172.46, plus interest thereon of $25.49; and miscellaneous personal property items of an aggregate value of $565. (R. 5.)

The estate tax shown due on the return filed by the respondent was duly paid and respondent thereafter filed a claim for refund of the entire amount. The general ground of the claim was that since all of decedent's property was restricted and held in trust for him under supervision of the United States and continued to be so held for the benefit of his heirs, the property was immune from federal taxation and therefore should not be included in his taxable estate. Except for a minor adjustment, not here material, the claim was formally rejected by the Commissioner of Internal Revenue on June 4, 1945. (R. 5–7.)

The 160 acres of land in decedent's estate were allotted to him under the provisions of the Original Creek Agreement between the United States and the Creek Tribe, ratified by Congress on March 1, 1901 (c. 676, 31 Stat. 861), as amended by the Supplemental Creek Agreement ratified by Congress on June 30, 1902 (c. 1323, 32 Stat. 500; Appendix, *infra*, pp. 12–14). Decedent

received one deed for 40 acres as a homestead and a separate deed for 120 acres.[1] (R. 7–9.)

[1] Decedent's allotment represented his share of the Tribal lands transferred to him individually by deeds dated August 28, 1903. The Creek agreements contemplated the extinguishment of the separate National or Tribal Government of the Indians. Under the terms of the Supplemental Creek Agreement, decedent's homestead was to "be and remain non-taxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefore." Section 19 of the Act of April 26, 1906 (c. 1876, 34 Stat. 137, 144; Appendix, *infra*, pp. 14–15) extended restrictions against incumbrance or alienation of all allotted lands for a period of 25 years from the passage of the Act unless earlier removed by Congress. It provided for continued tax exemption of restricted lands so long as title remained in the original allottee. The Act of May 27, 1908 (c. 199, 35 Stat. 312; Appendix, *infra*, pp. 16–17) amended Section 19 of the Act of April 26, 1906, by authorizing the Secretary of the Interior to remove restrictions against alienation or incumbrance of allotted lands in individual cases, with the provision that unrestricted land should be thereafter subject to taxation and all other civil burdens. The Act contained no mention of tax exemptions of Indian lands. By Act of May 10, 1928 (c. 517, 45 Stat. 495; Appendix, *infra*, pp. 17–18) Congress continued the restrictions on allotted lands to April 26, 1956, unless earlier removed under the appropriate statutory provisions. The Act, however, required each legally competent Indian to "designate" the particular 160 acres of his land which was "to remain exempt from taxation," while held by the Indian or any full-blood restricted Indian heir or devisee, until April 26, 1956. Section 3 of the Act (Appendix, *infra*, pp. 17–18) specifically subjected to all minerals produced from allotted lands after April 26, 1931, to state and federal taxes of every character. Section 4 (Appendix, *infra*, p. 18) authorized the State of Oklahoma to levy taxes on all allotted lands in excess of the designated 160 acres of each Indian.

Pursuant to Section 4 of the Act of May 10, 1928 (c. 517, 45 Stat. 495; Appendix, *infra,* p. 18) Punskee Field's originally allotted 160 acres were designated as his tax-exempt lands in June 1929. At the time of decedent's death those 160 acres of allotted lands were fully restricted and could not be sold, leased or otherwise incumbered without approval of the Secretary of the Interior, under the Act of Congress of April 26, 1906, ratified and approved by the Creek Tribe on October 2 and 3, 1907, and by the President of the United States on September 17, 1907, the Act of May 27, 1908, and the Act of May 10, 1928. (R. 7–8; see Appendix, *infra,* pp. 14–18).

On January 24, 1919, an oil and gas mining lease was executed covering Punskee Field's entire 160 acre allotment. Production was obtained in 1922. From that time until April 26, 1931, royalties, aggregating $566,339.11, were paid into Field's account with the Secretary of the Interior. During that period, also, interest in the amount of $83,010.56 was credited to Field's account on the balances appearing therein. Royalties accruing between April 26, 1931, and the date of Field's death, plus interest thereon, and certain minor items of income, brought Field's aggregate income paid to the Secretary of the Interior through the years, to $720,035.79. Of that amount there was disbursed to Field, or for his benefit, $388,896.19 prior to April 26, 1931, and $323,-

717.04 between that date and June 5, 1940. Of the United States Treasury bonds in decedent's estate on June 5, 1940, those of a value of $99,784.46 had been purchased for him on October 13, 1935. (R. 9.) The house and lot, valued in decedent's gross estate at $8,500, was purchased for him out of his restricted funds on January 9, 1924. (R. 7.)

Upon these special findings, the Court of Claims concluded that the cash and the bonds and real estate into which portions of the royalties had been converted were properly included in decedent's gross estate (R. 16–17), but that the 160 acres of designated allotted land, including the oil and gas royalty interest therein, should have been excluded (R. 14–16).

SPECIFICATION OF ERROR TO BE URGED

The Court of Claims erred:

In holding that the value of decedent's designated allotted land, including the oil and gas royalty interest therein, should have been excluded from his gross estate for federal estate tax purposes.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Claims that the value of decedent's 160 acres of designated allotted land and the value of the oil and gas royalty interest therein should have been excluded from his gross estate for federal estate tax pur-

poses is in direct conflict with the result of the decision of the Circuit Court of Appeals for the Tenth Circuit in *Landman* (*Estate of Jeanetta Burgess*) v. *Commissioner*, 123 F. 2d 787, certiorari denied, 315 U. S. 810. In that case the issues before the court were identical with those presented to the court below here, and on the question of the inclusion in the taxable estates of restricted Indians for federal estate tax purposes of the designated allotted lands and the oil and gas royalty interest therein, the decisions are irreconcilable.

In the *Burgess Estate* case, the court held that the value of the 160 acres of designated allotted land was properly included in the taxable estate of a deceased Creek Indian. The decision was premised on the concept that an estate tax is not a burden on the property comprising the estate but is an excise tax "upon the shifting of the economic burdens and benefits, or on the privilege of transferring property of decedent at death" (123 F. 2d at 790).

Subsequent to denial of certiorari in the *Burgess* case, this Court granted certiorari in *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598; that case involved the right of the State of Oklahoma to levy estate taxes on the transfers of estates of three members of the Five Civilized Tribes of Indians. This Court decided that the State of Oklahoma was authorized to subject to its estate taxes the entire property of which a

restricted Indian died possessed, except for the value of his 160 acres of designated allotted land. Four Justices of this Court dissented in that case on the ground that restriction of the Indian's property was tantamount to immunity from *State* taxation, a principle recognized as not extending to taxation by the Federal Government (319 U. S. 614–616, 621).

The brief on behalf of the United States in the *Oklahoma Tax Commission* case did not take issue with the decision of the Tenth Circuit in the *Burgess Estate* case, but expressed agreement as to the result there reached, though not as to some of the reasoning of the opinion (U. S. Br. 93–94, Nos. 623–625, Oct. T. 1942). The *Burgess Estate* case was cited by both the majority and the minority of this Court in the *Oklahoma Tax Commission* case, the majority referring to it (319 U. S. at 608) as a well-reasoned decision, and the minority explaining it (319 U. S. at 621) as having no bearing upon a consideration of the effect of restriction upon the power of a State to tax, for the historical reason that restrictions designed to protect the Indians from themselves and the actions of third parties, including State governments, did not bar taxation by the Federal Government.

In the instant case and in the prior case of *Landman* (*Estate of Jacob Pierce*) v. *United States*, 103 C. Cls. 199, the Court of Claims regarded the decision of this Court in the *Oklahoma Tax Commission* case as controlling. That court

drew no distinction between the power of the State of Oklahoma and that of the Federal Government to levy taxes on restricted Indians, and concluded that since the estate taxes of the State of Oklahoma and of the United States were identical in character, the same principle should be applicable to both.

While we believe that the Court of Claims was correct in concluding, both here and in the *Pierce* case, that any property subject to the State's estate tax is likewise subject to the Federal estate tax, it does not follow that the converse of that proposition is true, i. e., that property which is not subject to the State's estate tax is not subject to the Federal estate tax. In the *Oklahoma Tax Commission* case, a majority of this Court held that the transfer of those lands which Congress had exempted from direct taxation by the State was also exempted from State estate taxes (319 U. S. at 610–611). But it seems clear that both the majority and minority opinions were limited to the question of State taxes, and certainly nothing in either opinion reflects any disagreement with the result reached in the *Burgess Estate* case.

It may be doubted whether any of the specific exemptions from taxation contained in various Acts here pertinent were intended to prevent the application to Indians and their property of federal tax provisions which operate uniformly throughout the nation. It had early been held that Congress had power to lay taxes upon prop-

erty within Indian Territory (*The Cherokee Tobacco*, 11 Wall. 616). The specific tax exemption written into the earlier allotment acts were, we submit, designed solely to limit the taxing power of Territories and territorial townships, which were creatures of Congress. Moreover, under the Act of March 1, 1901 (Appendix, *infra*, pp. 12–14), and the supplemental agreement in the Act of June 30, 1902 (Appendix, *infra*, p. 14), the specific exemption from taxation was confined to the allotment of forty acres of land selected as a homestead and was limited to a period of twenty-one years. The allotment to the decedent in this case was in 1903, and he died in 1940.

There is nothing in the language or history of the Act of April 26, 1906, showing a purpose on the part of Congress that the exemption from taxation contained in Section 19 thereof (Appendix, *infra*, pp. 14–15), should apply to federal taxes; and, in any event, as this Court held in *Superintendent* v. *Commissioner*, 295 U. S. 418, 420–421), that section was superseded by Section 4 of the Act of May 27, 1908 (Appendix, *infra*, p. 16). Section 4, in terms at least, dealt only with the effect upon taxability of the removal of restrictions upon land.

It would seem clear that the Act of May 10, 1928, curtailed rather than extended the tax exemptions of Indian lands. This Court in the *Oklahoma Tax Commission* case gave the 1928 Act that effect. The only specific exemption contained in the Act of May 10, 1928, is set forth in

Section 4 (Appendix, *infra*, p. 18). The structure of that section warrants the conclusion that it deals only with taxation by the State of Oklahoma, a result which is consistent with its legislative history. See S. Rep. No. 982, 70th Cong., 1st Sess., pp. 4–5.

The question presented here is an important and continuing one in the administration of the internal revenue laws. Many similar estates of restricted Indians have claims for refunds pending in the Bureau of Internal Revenue involving the same issue. The Treasury Department, represented by the Commissioner of Internal Revenue, and the Department of the Interior, here represented by the Superintendent of the Five Civilized Tribes, have long disagreed as to the correct result. Administrative disposition of Indian estate matters will be promoted by an authoritative determination by this Court of the tax question involved

CONCLUSION

The decision below on the point here presented is in direct conflict with the result of the *Burgess Estate* case decided by the Tenth Circuit. The question is of general and continuing importance. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1947.

APPENDIX

Internal Revenue Code:

SEC. 810. RATE OF TAX.

A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent * * *.

* * * * *

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * * *

Original Creek Agreement, Act of March 1, 1901, c. 676, 31 Stat. 861:

* * * * *

3. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty

cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values, and any allottee receiving lands of less than such standard value may, at any time, select other lands, which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

* * * * *

7. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: *Provided,* That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who cannot select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said commission to make selection for him.

The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dis-

pose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from such limitation.

Supplemental Creek Agreement, Act of June 30, 1902, c. 1323, 32 Stat. 500:

* * * * *

MISCELLANEOUS

* * * * *

16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

* * * * *

Act of April 26, 1906, c. 1876, 34 Stat. 137:

* * * * *

SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act,

unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

* * * * *

Act of May 27, 1908, c. 199, 35 Stat. 312:

> * * * All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. * * *
>
> * * * * *
>
> SEC. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided,* That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law.
>
> * * * * *
>
> SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided,* That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdic-

tion of the settlement of the estate of said deceased allottee: *Provided further,* That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further,* That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

* * * * *

Act of May 10, 1928, c. 517, 45 Stat. 495:

* * * * *

SEC. 3. That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned

by other citizens of the State of Oklahoma; * * *.

SEC. 4. That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands: *Provided,* That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres, to remain exempt from taxation and shall file with the superintendent for the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected: *And provided further,* That in cases where such Indian fails, within two years from date hereof, to file such certificate, and in cases where the Indian owner is a minor or otherwise legally incompetent, the selection shall be made and certificate prepared by the superintendent for the Five Civilized Tribes; * * * and said lands, designated and described in the approved certificates so recorded, shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir or devisee of the land: *Provided,* That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: *And provided further,* That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.

U. S. GOVERNMENT PRINTING OFFICE: 1947